



ATTORNEY GENERAL OF TEXAS
G R E G A B B O T T

March 15, 2005

Mr. Robert E. Hager
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2005-02208

Dear Mr. Hager:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 220321.

The City of Rowlett (the "city"), which you represent, received a request for a preliminary infrastructure improvement assessment performed for the city by Johnson Controls, Inc. ("Johnson Controls"). You appear to believe that some of the requested information may be excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You also inform us that you have notified Johnson Controls of this request for information.¹ We have considered your arguments and have reviewed the information you submitted.

Initially, we address the city's obligations under section 552.301 of the Government Code. This section prescribes procedures that must be followed in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.302 provides that if a governmental body does not request an attorney general decision

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302; *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You have not informed this office of the date on which the city received the present request for information. *See* Gov't Code § 552.301(e)(1)(C). However, based on the documentation that you have provided, it appears that the city received the request on or before December 21, 2004. You requested this ruling on January 6, 2005. Assuming that the city received the present request on or before December 21, the date of your request for this ruling was beyond your ten-business-day deadline under section 552.301(b). Thus, you have not demonstrated that the city complied with section 552.301 in requesting this ruling. Therefore, the submitted information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information. The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.104 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 592 at 8 (1991) (statutory predecessor to Gov't Code § 552.104 subject to waiver). Your assertion of section 552.104 does not provide a compelling reason for non-disclosure under section 552.302. In failing to comply with section 552.301, you have waived this exception. *See* Open Records Decision No. 663 at 5 (1999) (failure to comply with Gov't Code § 552.301 resulted in waiver of discretionary exceptions). Therefore, the city may not withhold any of the submitted information under section 552.104.

A claim under section 552.101 can provide a compelling reason for non-disclosure. This section excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). You have not informed this office, and we are not otherwise aware, of any law under which any of the submitted information is considered to be confidential for purposes of section 552.101. Therefore, the city may not withhold any of the submitted information under that exception.

Next, we note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, this office has received no correspondence from Johnson Controls. Thus, Johnson Controls has not shown that any of the submitted

information is confidential or proprietary for purposes of the Act. *See* Gov't Code §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). Therefore, as neither the city nor Johnson Controls has demonstrated the existence of any compelling reason to withhold any of the submitted information, all of the information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

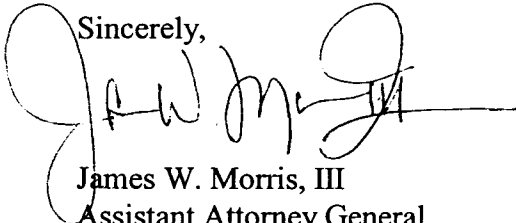
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J W Morris III', written over the word 'Sincerely,'.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 220321

Enc: Submitted documents

c: Mr. Joe C. Davis
110 Bent Creek Ranch Court
Fort Worth, Texas 76126
(w/o enclosures)

Mr. Tim Evans
Johnson Controls, Inc.
3021 West Bend Drive
Irving, Texas 75063
(w/o enclosures)